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No. 98-2060

In the Supreme Court of the United States

RONALD D. EDWARDS, WARDEN,
Petitioner,

v.

ROBERT W. CARPENTER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* STATES OF TEXAS, ALASKA, ARKANSAS, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, IDAHO, ILLINOIS, IOWA, KANSAS, LOUISIANA, MARYLAND, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, AND WASHINGTON IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI CURIAE* INTEREST

The State of Texas, and the 24 other States that join in this brief urge the Court to grant certiorari in this case to address an important question affecting the States' interest in the finality of state criminal convictions. At issue is whether a federal court reviewing a writ of habeas corpus is barred from considering an ineffective assistance of counsel claim as "cause" for the procedural default of another claim when the ineffective assistance claim itself is procedurally defaulted. The Sixth Circuit said no. *Carpenter v. Mohr*, 163 F.3d 938, 945-46 (CA6 1998), *petition for cert. filed* (U.S. June 22, 1999) (No. 98-2060).

The Sixth Circuit's decision overlooks well-established precedent requiring that it conduct a "cause" and "prejudice" analysis on the defaulted ineffective assistance claim before using the ineffective assistance of counsel claim as "cause" for another procedurally defaulted claim. Its argument that the Supreme Court was merely concerned with exhaustion of an ineffective assistance of counsel claim before it could serve as "cause" for a procedurally defaulted independent issue misinterprets the Court's precedent regarding procedural bars in federal court.

Because the court of appeals has effectively ruled that procedurally defaulted ineffective assistance of counsel claims will be resurrected in federal court to serve as "cause" for other procedurally defaulted claims, a petitioner can knowingly choose to default claims in state court in hopes that a federal court will accord more favorable review of his federal claims. This creates a risk of forum-shopping for constitutional claims and undermines the States' legitimate interests in having the first opportunity to right their mistakes. Thus, the Sixth Circuit's decision offends state sovereignty.

If left standing, the lower court's opinion opens the doors to a flood of federal habeas litigation. Based on this decision, habeas petitioners can return to state court and file abusive state writs alleging a laundry list of ineffective assistance of counsel claims and bootstrap those claims to

other claims that have already been procedurally defaulted. For these reasons, the Sixth Circuit's decision undercuts long-standing principles of comity.

One of the purposes of the procedural default doctrine is to acknowledge the binding nature of state rules of procedure that preclude independent review by federal courts. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). In addressing a claim that has been procedurally defaulted in state court, a federal court shows a complete disregard for state procedural rules. Repeatedly, the Court has "emphasized the important interests served by state procedural rules at every stage of the judicial process and the harm to the States that results when federal courts ignore these rules." *Coleman v. Thompson*, 501 U.S. 722, 749 (1989). Indeed, the Court has recognized that "[a] state's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack." *Murray v. Carrier*, 477 U.S. 478, 490 (1986). Based on this long history of respect for state procedural requirements, the Court cannot countenance the Sixth Circuit's reasoning.

The Second, Fourth, Seventh, Eighth, and Eleventh Circuits have also addressed the issue and decided it contrary to the Sixth Circuit's position. *Reyes v. Keane*, 118 F.3d 136, 139-40 (CA2 1997); *Justus v. Murray*, 897 F.2d 709, 713 (CA4 1990); *Pisciotti v. Washington*, 143 F3d 296, 300 (CA7 1998); *Harris v. Lockhart*, 948 F.2d 450, 452 (CA8 1991); *Hill v. Jones*, 81 F.3d 1015, 1030 (CA11 1996), *cert. denied*, 519 U.S. 1119 (1997). The Sixth Circuit's decision creates a split in the circuits, and makes this important question ripe for review by the Court. Accordingly, certiorari should be granted and the decision below reversed.

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Amici file this brief on behalf of Petitioner, Ronald D. Edwards, because this case presents an issue of extraordinary importance to the states on which there is a clear conflict among the circuits. The Court should grant the petition for writ of certiorari because allowing habeas corpus petitioners to revive procedurally defaulted claims with another procedurally defaulted claim violates principles of state sovereignty.

SUMMARY OF THE ARGUMENT

A federal court reviewing a state prisoner's habeas corpus petition must respect a state court's determination that a particular claim is procedurally barred under state law. *Wainwright*, 433 U.S. at 90-91. When the state court has "clearly and expressly" stated that its judgment rests on a state procedural bar, a presumption arises that the state court decision rests on independent and adequate state law grounds. *Harris v. Reed*, 489 U.S. 255, 263 (1989). The purpose behind the independent and adequate state law doctrine is "to accord appropriate respect to the sovereignty of the states in our federal system." *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 154 (1979). Consequently, a federal court's disregard for a state procedural default greatly taxes the states because it: 1) improperly threatens the finality of criminal convictions; and 2) frustrates the states' sovereign power to punish criminal offenders and their good faith efforts to honor constitutional rights. *Murray*, 477 U.S. at 487; *Coleman*, 501 U.S. at 748. Because of the circuit split on this important issue, the Court should grant the petition for writ of certiorari to hear this case.

ARGUMENT

I. THE PROCEDURAL DEFAULT DOCTRINE IS FOUNDED ON PRINCIPLES OF COMITY AND FEDERALISM.

The Sixth Circuit's conclusion that "[p]rinciples of comity do not require placing a procedural default analysis on claims asserted as cause" misinterprets this Court's procedural default jurisprudence. It is true that the doctrines of exhaustion and procedural default are distinct, but they share a common foundation on long-standing principles of federalism.

Murray, 477 U.S. at 495 ("[T]he principles of comity and finality . . . inform the concepts of cause and prejudice."); *see also Wainwright*, 433 U.S. at 81 ("[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts."); *Coleman*, 501 U.S. at 731 ("[T]he exhaustion requirement is also grounded in principles of comity."); *Picard v. Connor*, 404 U.S. 270, 275 (1971) ("Comity is the underlying rationale for the exhaustion requirement.").

The court of appeals wrongly concluded that merely imposing the exhaustion requirement on claims asserted as "cause" for a procedural default sufficiently ensures that the state court has had the first opportunity to review the claims. *Carpenter*, 163 F.3d at 945. In fact, a claim that is procedurally defaulted is not reviewed on the merits by the state courts. This Court explicitly founded the procedural default doctrine on principles of comity and federalism. *Coleman*, 501 U.S. at 730. The *Harris* Court explicitly established the adequate and independent state ground doctrine to demonstrate respect for state procedural rules. *Harris*, 489 U.S. at 264. Like a petitioner who has failed to exhaust state court remedies, a petitioner who has procedurally defaulted his claims in state court has deprived the state of the opportunity to review those claims. *Coleman*, 501 U.S. at 732.

The doctrine of exhaustion is a statutory prerequisite to obtaining federal habeas review of a constitutional claim. 28 U.S.C. §2254(b) (1999). Similarly, the doctrine of procedural default is a common-law condition precedent to federal habeas review. *Murray*, 477 U.S. at 517 (Brennan, J., dissenting); *see also Harris*, 489 U.S. at 259. These two requirements must be independently met before a federal court will review a federal claim that was first presented to the state courts. Consequently, the Sixth Circuit's finding that "[t]here is no additional requirement beyond exhaustion in order for a petitioner to utilize ineffective assistance of appellate counsel as cause for the procedural default of an independent claim" is wrong. *Carpenter*, 163 F.3d at 945. A careful review of this Court's procedural default jurisprudence shows

the lower court has made a glaring error. Federalism concerns demand that a federal court abstain from reviewing a claim when the state court relied on a procedural bar for dismissing the very same claim. *Coleman*, 501 U.S. at 729-30.

II. THE PROCEDURAL DEFAULT DOCTRINE DICTATES A "CAUSE AND PREJUDICE" ANALYSIS ON ALL CLAIMS PROCEDURALLY DEFAULTED IN STATE COURT.

A procedural default occurs when a criminal defendant fails to comply with a state procedural rule. *Wainwright*, 433 U.S. at 82-84. Generally, a state court will not review the merits of a procedurally defaulted claim, and a federal court is likewise barred from addressing the merits of the claim. *Id.* In finding that a habeas petitioner can use a procedurally defaulted ineffective assistance of counsel claim as cause for the procedural default of another claim, the court of appeals has erroneously opened the federal courthouse doors to state prisoners with defaulted claims. This Court's decisions in *Wainwright*, *Murray*, *Harris*, and *Coleman* compel a cause and prejudice analysis on a procedurally defaulted ineffective assistance of counsel claim before it can serve as "cause" for another procedurally defaulted claim.

In *Wainwright*, the Court held that to obtain federal habeas review of a constitutional claim that has been procedurally defaulted under state rules, a petitioner must show cause for the default and resultant prejudice. 433 U.S. at 87. The Court explicitly left open the question of the "precise definition of the 'cause'-and-'prejudice' standard." *Id.* at 88-91. This open question was revisited in *Murray*.

In *Murray*, the habeas petitioner, Carrier, procedurally defaulted his claim that the trial court erred in denying his discovery request for the victim's statements because he failed to present the issue on direct appeal. 477 U.S. 482-83. Carrier raised the discovery claim for the first time in his *pro se* state habeas petition. The state trial court dismissed the claim based on the procedural default, and the Virginia Supreme Court denied certiorari. Carrier raised the issue in his federal petition,

which the federal district court dismissed as procedurally barred. On appeal, Carrier argued that counsel had mistakenly omitted the claim on direct appeal, and this error was "cause" for the procedural default. The court of appeals reversed and remanded holding that a petitioner need only show that a procedural default was due to counsel's "ignorance or inadvertence rather than from a deliberate tactical decision." This Court decided that the court of appeal's standard was incorrect.

Carrier asked the Court to establish a lesser standard of counsel error, *i.e.*, mistake or inadvertence, to serve as "cause" for a procedural default on appeal. *Id.* at 490. The Court flatly rejected that proposition and held that only constitutionally deficient performance could constitute cause for a procedural default. *Id.* at 492. Accordingly, in *Murray* this Court firmly held that constitutionally ineffective assistance of counsel as established in *Strickland v. Washington*, 466 U.S. 668 (1984), can serve as "cause" for a procedural default of another claim provided that the ineffective assistance of counsel claim was independently raised in state courts. *Id.* at 488-89.

Carrier had not raised an independent claim of ineffective assistance of counsel in state court. In fact, the Court found that Carrier "disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim." 477 U.S. at 497. Consequently, because the Court found that Carrier was not raising an ineffective assistance of counsel claim for the default of his discovery issue, Carrier could not establish "cause" and the discovery claim was procedurally barred. *Id.*

In *Harris*, the Court found that federal habeas review of the petitioner's ineffective assistance claim was not precluded because the state appellate court, although mentioning a state procedural default, had addressed the substantive merits in rejecting the claim. 489 U.S. at 266. The Court held that "[a] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Id.* at 263. In other words,

Harris established a presumption against an adequate and independent state law ground to support the state's decision when the last state court fails to explicitly state its reliance on a procedural default.

In *Coleman*, the petitioner filed an untimely notice of appeal from the state habeas court's adverse ruling. 501 U.S. at 727. The state moved to dismiss the appeal on the ground that the notice of appeal had not been filed within the time prescribed by a state procedural rule. *Id.* at 727-28. "Upon consideration" of the state's motion to dismiss and other pleadings filed, the state supreme court dismissed the appeal. *Id.* Because the state's motion to dismiss was based solely upon the state's procedural rule, this Court found that the state supreme court's dismissal appeared to rest primarily on state law. *Id.* at 740-44. Thus, the *Harris* presumption against adequate and independent state grounds did not apply and the federal habeas court was barred from reviewing the claims presented in the state habeas proceeding. *Id.* at 729-30, 740-44.

Contrary to this Court's clear precedent, however, the Sixth Circuit disregarded the state's procedural rules. Based on the court of appeals's opinion, any defaulted ineffective assistance of counsel claims can be resurrected in federal court by serving as "cause" for other independently procedurally defaulted claims. Acceptance of the Sixth Circuit's interpretation of *Murray* would subvert the important interests of finality, comity, and federalism underlying the Court's procedural default jurisprudence.

The Sixth Circuit's interpretation of this Court's precedent is unfounded. The court of appeals concluded that the *Murray* Court was merely concerned with exhaustion of an ineffective assistance of counsel claim before it could serve as "cause" for another procedurally defaulted claim. *Carpenter*, 163 F.3d at 944. While it is true that the *Murray* Court stated that an ineffective assistance of counsel claim would need to be presented as an independent claim to the state courts before it could serve as "cause" for a separate procedurally defaulted claim, the Court expressed no opinion as to whether a procedurally defaulted ineffective assistance of counsel claim could serve as "cause." 477 U.S. at 489.

Indeed, in *Murray*, the petitioner was not even alleging an ineffective assistance of counsel claim. 477 U.S. at 483, 497. *Murray* cannot be interpreted in a vacuum. It must be considered in conjunction with the Court's other procedural default cases, *i.e.*, *Wainwright*, *Harris*, and *Coleman*.

The Sixth Circuit held that *Murray* did not impose a procedural default requirement for claims asserted as "cause," thus it refused to apply a cause and prejudice analysis on the defaulted ineffective assistance of counsel claim. The court of appeals's reasoning ignores the states' legitimate interest in the finality of their convictions and undermines the states' right to punish criminal defendants. *Coleman*, 501 U.S. at 748. This reasoning is contrary to the reasoning employed by this Court in *Wainwright*, *Harris*, and *Coleman*, although none of the cases directly addressed whether a procedurally defaulted ineffective assistance of counsel claim can serve as "cause" for another defaulted constitutional claim.[1] This issue should be squarely addressed by the Court.

III. This Case Requires Immediate Review to Protect the States' Interests in Enforcement of Their Procedural Rules.

It is firmly established that a federal court cannot review a claim that has been explicitly ruled procedurally barred by the state's highest court considering the claim. *Harris*, 489 U.S. at 261-62; *Coleman*, 501 U.S.

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1. In a recent opinion, the Court stated that an ineffective assistance of counsel claim could not serve as "cause" for the procedural default of an Eighth Amendment claim because "the ineffective assistance of counsel [was], itself, procedurally defaulted." *Stewart* v. *LaGrand*, 119 S.Ct. 1018, 1021 (1999). Also, the Court indicated that the defaulted ineffective assistance claim was subject to the "cause and prejudice" standard. *Id.* Although the Court did not refer to any prior procedural default cases, the Court's reasoning in *Stewart* directly contradicts the Sixth Circuit's reasoning. The Court should take this case to remove any uncertainty as to the Court's holding in *Stewart*, and reaffirm the resounding principle of the independent and adequate state ground doctrine.

at 729-30. When a state court explicitly relies on a procedural bar to deny relief, a state prisoner may not obtain federal habeas relief unless he can demonstrate cause for the default and actual prejudice attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750; *Wainwright*, 433 U.S. at 87.

Murray established that when counsel is ineffective under the standard of *Strickland*, this may serve as "cause" within the meaning of *Wainwright*. 477 U.S. at 488-89. Also, *Coleman* reiterated that "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." 501 U.S. at 755. Therefore, an ineffective assistance of counsel claim cannot serve as "cause" for the procedural default of another claim, unless counsel's performance was constitutionally deficient. *Murray*, 477 U.S. at 492. Although this Court has cautioned that an ineffective assistance of counsel claim must have first been presented to the state courts as an independent claim in order for it to serve as "cause" in a federal court proceeding, it has not explicitly answered whether a procedurally defaulted ineffective assistance of counsel claim may serve as "cause." Logically, it should not.

Before finding that an ineffective assistance of counsel claim constitutes "cause" for another procedurally defaulted issue, a federal court must find that counsel's performance was constitutionally deficient. *Coleman*, 501 U.S. at 755. When a federal court addresses the merits of an ineffective assistance of counsel claim independently, it is reviewing a claim that the state courts never addressed because of the procedural default. The court of appeals acknowledged that independent review of the ineffective assistance of counsel claim was barred because the claim was defaulted in state court, yet found that *Murray* creates an exception and allows the claim to serve as "cause" for another procedurally defaulted claim when the claim is merely exhausted. *Carpenter*, 163 F.3d at 945 ("There is no additional requirement beyond exhaustion in

order for a petitioner to utilize ineffective assistance of appellate counsel as cause for the procedural default of an independent claim.").

The court of appeals's reasoning defies logic. In this case, the state court's denial of relief is based on a state procedural default. *Carpenter*, 163 F.3d at 942. By failing to satisfy a state procedural requirement, Carpenter forfeited his right to review of the merits of his federal claim. The court of appeals's opinion overlooks well-established precedent requiring that it conduct a "cause" and "prejudice" analysis on Carpenter's defaulted claim before using the ineffective assistance of counsel claim as "cause" for another defaulted claim.

In contrast, the district court did apply a cause and prejudice analysis to the defaulted ineffective assistance of counsel claim and found that the procedural bar was not based on an adequate and independent state ground.[2] *Carpenter*, 163 F.3d at 943. The district court's analysis is consistent with procedural bar jurisprudence. The court of appeals derails this well-established precedent by deciding that a procedurally defaulted ineffective assistance of counsel claim can constitute "cause" for another procedurally defaulted claim without a cause and prejudice analysis on the ineffective assistance of counsel claim.

Because Carpenter's claim was dismissed on an independent and adequate state law ground, "resolution of any independent federal ground

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2. The district court's decision was based on the court's belief that Ohio had inconsistently applied the "good cause" standard in OHIO R. APP. P. 26. The court stated that in its review of Ohio cases, good cause was almost never found in some appellate districts, while in others, a standard was used that nearly always allowed a finding of good cause. Additionally, the district court noted that the Ohio Supreme Court had offered little guidance in this area. As a result, the district court found that Ohio did not have an adequate state procedural rule prohibiting subsequent review of federal constitutional claims in federal court. *Carpenter v. Mohr*, No. C-2-96-447 (S.D. Ohio Mar. 12, 1997). Because the Sixth Circuit did not agree with nor review the district court's finding, this Court should grant the petition and reverse and remand to afford the Sixth Circuit the opportunity to review this part of the district court's decision.

for the decision could not affect the judgment and would therefore be advisory." *Coleman*, 501 U.S. at 729. In fact, the procedural history of this case emphasizes the fundamental wisdom of barring federal habeas review based on an independent and adequate state ground of decision. The state courts never addressed Carpenter's constitutional complaint of ineffective assistance of appellate counsel because he failed to raise it in a procedurally correct manner. By deciding the issue, the court of appeals decided an issue that the state courts never considered and, potentially, given an award of relief broader than the Supreme Court could have permitted on direct review of the conviction. These actions are inappropriate for a court bound by federalism and comity.

IV. THIS CASE HAS CREATED CONFUSION AND CONFLICT AMONG THE LOWER COURTS.

Of the six courts of appeals that have addressed this issue, the Sixth Circuit stands alone in its conclusion that a procedurally defaulted ineffective assistance of counsel claim can serve as "cause" for another defaulted claim. The Sixth Circuit's interpretation of *Murray* adds confusion to the procedural default doctrine. As previously discussed, the district court applied a cause and prejudice analysis to Carpenter's defaulted ineffective assistance of counsel claim. *Carpenter*, 163 F.3d at 943-44. Upon review, the district court determined that the state procedural rule was not an adequate and independent state ground, therefore it found that the ineffective assistance of counsel claim could serve as "cause" for the procedurally defaulted sufficiency of the evidence claim. The court of appeals found that the district court erred in applying a "cause and prejudice" analysis on the defaulted ineffective assistance of counsel claim. *Id.*

Similarly, in *Justus v. Murray*, 897 F.2d 709, 712 (CA4 1990), the district court employed the same reasoning as the Sixth Circuit in finding that a procedurally defaulted ineffective assistance of counsel claim could serve as cause under *Murray* because the claims were exhausted. On appeal, the Fourth Circuit rejected the district court's reasoning and held that *Wainwright* and *Harris* compel a "cause and prejudice" analysis

before a procedurally defaulted ineffective assist ›f counsel claim can serve as cause for another procedurally defau laim. *Id.* at 713. In juxtaposition, these two cases show that the Fou Circuit supports the district court's reasoning in *Carpenter*, and the Sixth Circuit favors the district court's reasoning in *Justus*.

Other lower courts that have faced this double-default dilemma are also in conflict with the Sixth Circuit's reasoning. In *Hill v. Jones*, the Eleventh Circuit flatly rejected petitioner's argument that *Murray* allows an ineffective assistance of counsel claim to serve as "cause" whenever the claim is exhausted as an independent claim regardless of whether it is also procedurally defaulted. 879 F.2d at 1029. The court concluded that *Murray* and "the rest of the Supreme Court's jurisprudence on procedural default dictate that procedurally defaulted claims of ineffective assistance cannot serve as cause to excuse a default of a second claim." *Id.* at 1030. "Instead, [*Murray*] requires a claim of ineffective assistance be both exhausted and not defaulted in state court before it can be asserted as cause." *Id.* at 1031.

In *Reyes v. Keane*, the petitioner argued that he satisfied "cause" for procedurally defaulting a jury instruction claim because his trial counsel rendered ineffective assistance. 118 F.3d at 138-39. Recognizing that an ineffective assistance of counsel claim can constitute "cause," the Second Circuit, nonetheless, found that petitioner failed to raise his ineffective assistance of counsel claim in state court. *Id.* at 139. Also, the ineffective assistance claim was procedurally defaulted because pursuant to state law presenting the claim to the state court would be futile. *Id.* Thus, the ineffective assistance of counsel claim was both exhausted and procedurally defaulted. Refusing to allow the ineffective assistance claim to serve as cause, the Second Circuit aptly stated:

> *Murray* refused to except from the doctrine of exhaustion a claim brought as cause for a procedural default. We think the Supreme Court's rationale . . . equally compels the conclusion that a claim of cause for procedural default is not itself excepted from the doctrine of procedural default.

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Id. at 140 (citations omitted). Accordingly, the court held that a procedurally defaulted ineffective assistance of counsel claim could not serve as cause for a second procedurally defaulted claim. *Id.*

In *Pisciotti v. Washington*, the Seventh Circuit also addressed the question posed in this petition. The court of appeals stated that before an ineffective assistance of counsel claim could establish "cause" for the default of another issue, "the ineffective-assistance claim must have been presented to the state courts in the manner required by state procedural rules." 143 F.3d at 300. Finally, in *Harris v. Lockhart*, the Eighth Circuit also held that a defaulted ineffective assistance of counsel claim could not serve as "cause" for the default of his other claims. 948 F.2d at 452.

The lower courts not governed by controlling precedent in their circuit are free to pick and choose the preferred reasoning from among these decisions. The Sixth Circuit's reasoning is at odds with the other circuits that have addressed the issue to date. Because the state pays a high price[3] when a federal court reviews a claim that is barred by the state courts, the Court should not let the Sixth Circuit's decision stand. The reasoning employed by the lower court is fundamentally flawed and will undermine a long history of respect for the states' procedural rules.

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3. As the Court stated in *Coleman*:

> most of the price paid for federal review of state prisoner claims is paid by the State. When a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction.

Coleman, 501 U.S. at 738-39.

CONCLUSION

For these reasons, *Amici* respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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